December 2019

Decision in CPLR Article 78 proceedings - Eckardt-Rigberg, Ian (2017-01-06)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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In the matter of the Application of
IAN ECKARDT-RIGBERG, 13 A 1560,

Petitioner,

-against-

DECISION and ORDER
Index No. 1638-16
RJI No. 52-38569 2016

TINA M. STANFORD, CHAIR OF THE
NEW YORK STATE BOARD OF PAROLE,

Respondent.

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APPEARANCES:
Kathy Manley, Esq., 74 Chapel Street, Albany, NY 12207, Attorney for Petitioner
Attorney General of the State of New York, One Civic Center Plaza–Suite 401, Poughkeepsie, NY 12601, By: Heather R. Rubenstein, AAG, of counsel, Attorney for Respondent

Schick, J.

This matter comes before the Court on Petitioner's Article 78 Petition requesting a *de novo* parole hearing. Respondent submitted and affirmation in opposition. Petitioner submitted a Reply. The parties appeared for oral argument on January 5, 2017.

Factual Background

Petitioner was convicted, by guilty plea, of Manslaughter in the Second Degree and operating a Motor Vehicle–Leaving the Scene of an Accident. Albany County Court (Hon. Thomas A. Breslin) sentenced Petitioner to an indeterminate term of three and a third to 10 years in state prison for the manslaughter conviction, to run concurrently with an indeterminate term of two to six years in state prison for the leaving the scene of an accident conviction. The instant offenses involved Petitioner driving at a high rate of speed through a red traffic light while being pursued by the police. He struck a pedestrian, killing him, and fled the scene of the accident. Petitioner initially took flight from the police when they attempted to pull him over for speeding; his driver's license had been suspended for previous speeding violations.

Petitioner is currently housed at Sullivan Correctional Facility. He has been diagnosed with Asperger's Syndrome and Attention Deficit Hyperactivity Disorder (ADHD). While in state custody, Petitioner has had no disciplinary infractions, has completed all required programming (as of the date of his parole interview), has taken additional programming and college

educational classes, and has an Earned Eligibility Certificate. Petitioner has no criminal history prior to the instant offenses.

The record before the Court indicates Petitioner has assurances of employment upon his release, and that he will live with his parents and extended family in Delmar, New York. He submitted a very detailed and specific plan to the parole board should he be released to supervision.

Petitioner appeared for his initial parole interview on March 8, 2016, at Sullivan Correctional Facility. The board denied parole release and imposed a 24-month hold. Petitioner timely perfected an administrative appeal on July 12, 2016. The Appeals Unit affirmed the board's denial of parole by decision dated August 8, 2016.

Petitioner timely filed the within Article 78 petition, raising the following issues: (1) that the board relied solely on the instant offenses in making its decision; (2) the board ignored his youthful age when he committed the instant offenses; (3) the Parole Board Report had errors; (4) the board failed to comply with the 2011 amendments; (5) the regulations violate the separation of powers provision of the constitution; (6) the board failed to provide detail or substantial evidence; and (7) the board's decision was predetermined.

For the reasons indicated below, this Court grants Petitioner's request for a *de novo* parole interview.

Parole Law

Executive Law, Section 259-i(2)(c)(A) states in pertinent part:

> In making the parole release decision, the guidelines adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interpersonal relationships with staff and inmates; (ii) performance, if any, as a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate....

The parole board must also consider whether "there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law." 9 **NYCRR 8002.1**.

In reaching its decision, the board must also consider:

(a) the inmate's institutional record;

(b) the inmate's release plans;
(c) any statement made to the board by the victim's representative;
(d) the seriousness of the offense, with consideration of the sentence and the recommendation of the sentencing court; and
(e) the inmate's prior criminal record.

Regarding an earned eligibility certificate (EEC), **9 NYCRR, Section 8002.1(b)** states,

> Earned eligibility. Inmates statutorily eligible to receive a certificate of earned eligibility pursuant to section 805 of the Correction Law, and who have been issued such certificates by the Commissioner of Correctional Services, *shall* be granted parole release at the expiration of their minimum terms or as authorized by subdivision 4 of section 867 of the Correction Law, unless the Board of Parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that release is not compatible with the welfare of society.

Furthermore, when a parole board reviews release for an inmate *with an EEC*, pursuant to **9 NYCRR §8002.3(c)**, it *must* comply with the following:

> In those cases where a certificate of earned eligibility has been issued, the board *shall* consider the following in making the parole release decision:
> (1) the guideline time-range matrix;
> (2) the institutional disciplinary record;
> (3) performance, if any, as a participant in a temporary release program;
> (4) release plans, including community resources, employment, education and training, and support services available to the inmate; and
> (5) any available information which would indicate an inability to live and remain at liberty without violating the law, and that the release is incompatible with the welfare of society.

When denying release to an inmate with an EEC, a parole board *must* articulate a rationale to support a decision that if released the inmate would not remain at liberty without violating the law and that release would not be compatible with the welfare of society; simply regurgitating the language of the statute is not enough to overcome the burden of the presumption that the inmate should be released. ***Schwartz v. Dennison*, 14 Misc.3d 1220(A), 1227(A) [S. Ct. New York Co. 2006]**. Discussion and questioning of the statutory factors, if not supported by the evidence in the record, is merely perfunctory and grounds for reversal and a *de novo* hearing. ***Id.* at 1228(A); *Oberoi v. Dennison*, 19 Misc.3d 1106(A) [S. Ct. Franklin Co. 2008].**

Parole Boards have very wide discretion to grant or deny parole release; the board decides how much weight to give each of the factors listed above. ***Phillips v. Dennison*, 41 A.D.3d [1st Dept. 2007]**. It is also not necessary that the board expressly discuss each of the factors or any

guidelines in its determination. ***Walker v. Travis*, 252 A.D.2d 360 [3rd Dept. 1998]**. An inmate bears the heavy burden of establishing that the determination of a parole board was the result of "irrationality bordering on impropriety." ***Matter of Silmon v. Travis*, 95 N.Y.2d 470 [2000]; *Russo v. New York State Bd. of Parole*, 50 N.Y.2d 69 [1980]**. Nonetheless, the reasons for denying parole must "be given in detail and not in conclusory terms." **Executive Law, Section 259-i(2)(a); *Wallman v. Travis*, 18 A.D.3d 304 [1st Dept. 2005]; *Malone v. Evans*, 83 A.D.3d 719 [2nd Dept. 2011]**.

The standard of review in regard to parole release is whether the decision was so irrational as to border on impropriety. ***Matter of Russo v. New York State Board of Parole*, 50 NY2d 69 [1980]; *Epps v Travis*, 241 AD2d 738 [3rd Dept. 1997]; *Matter of Silmon v. Travis*, 95 NY2d 470 [2000]**. When considering the various factors, the weight accorded to any particular factor is solely within a parole board's discretion. ***Matter of Santos v. Evans*, 81 AD3d 1059 [3rd Dept. 2011]; *Matter of Wise v. New York State Division of Parole*, 54 AD3d 463 [3rd Dept. 2008]**. Included in such factors are the seriousness of the instant offense(s) and an inmate's criminal history. **Executive Law §259-i(2)(A)**.

In 2011, the legislature made changes to **Executive Law, §259**. The changes to **Executive Law, §259-c(4)** became effective on October 1, 2011. In essence, those modifications now require that parole boards (1) consider the seriousness of the underlying crime in conjunction with the other factors enumerated in the statute, **Executive Law, §259-i(2)**, and (2) conduct a risk assessment analysis to determine if an inmate has been rehabilitated and is ready for release. **Executive Law, §259-(c)(4)**. The changes were intended to shift the focus of parole boards to a forward-thinking paradigm, rather than a backward looking approach to evaluating whether an inmate is rehabilitated and ready for release.

Discussion

While a parole board enjoys a significant level of discretion, the discretion is not unlimited. There are three things a parole board cannot do. First, a parole board cannot base its decision to deny parole release solely on the serious nature of the underlying crime. ***Rios v. New York State Div. of Parole*, 15 Misc3d 1107(A) [Sup. Ct. Kings Co. 2007]; *see also*, *King v. New York State Division of Parole*, 190 AD2d 423 [1st Dept. 1993]**. Second, while the board need not consider each factor separately, and has broad discretion to consider the importance of each factor, the board *must still consider all of the factors and guidelines*. **Executive Law §259-i(2)(a); *Rios, supra*.** Third, the reasons for denying parole must be given in detail and not conclusory terms. **Executive Law §259-i(2)(a); *Wallman v. Travis*, 18 AD3d 304 [1st Dept. 2005]**.

After a thorough review of the record before this Court, including the confidential materials for *in camera* review and the issues raised during oral argument, this Court has determined the board based its decision to deny parole release to Petitioner solely on the nature of the instant offense and tragic consequences, did not consider all of the guidelines or factors,

failed to consider the EEC (despite mentioning it in passing), and the decision was in conclusory terms. The Court is unable to determine on what *legitimate grounds* the board denied release. The only language in the decision that provides any insight into the board's decision is the board's unsupported conclusion that because Petitioner did not seek assistance for the victim and drove off, he showed "no regard for that human life," and therefore, years later, he is somehow unrehabilitated and a safety risk to the public. Considering all of the other required factors, i.e., the EEC, programming, plans for release, completely clean disciplinary history while incarcerated, family and professional support, and other factors, the denial of parole release was arbitrary and capricious and unsupported by the record. Petitioner cannot change what happened, or his decision to leave the scene of the accident. What he could do, and what he did do, was maintain a clean disciplinary history while incarcerated, take all programs available to and required of him, take additional education programs on the college level, learn skills, show remorse and accept responsibility for his criminal behavior, and do everything required by DOCCS and the statute to rehabilitate himself and ready himself for parole release.

There is no additional rationale, other than the board's opinion of the tragic consequence of Petitioner's criminal behavior, to justify denial of parole release. Petitioner has had a perfect disciplinary record while incarcerated; has completed required DOCCS programs; has demonstrated remorse and responsibility for the crimes; and he has a substantial support system on the outside, release plans, and housing and employment ready upon his release. The written decision does no more than recite the statutory language upon which a board may deny release to parole, but does little more to explain, in sufficient detail, how the board came to such conclusions, other than its unfounded conclusion that Petitioner is unfit for release because years ago, when he committed the instant offenses, he did not seek help for the victim. Petitioner's EEC, which creates a presumption of release, required that the board to articulate actual reasons to support its conclusion that Petitioner "would not live at liberty without again violating the law and furthermore [his] release would be incompatible with the welfare of society." ***Schwartz v. Dennison, supra***. There is nothing in the record to support that conclusion, upon which it based its denial of parole release; in fact, the record contradicts the board's conclusion.

In addition, this court finds that the parole board could not have seriously considered the factors required under **9 NYCRR §8002.3(c)** regarding the EEC. Petitioner has a clean disciplinary history. Petitioner has a family and definite release plans. He has no criminal history. There is nothing in the record, overall or specifically, to indicate Petitioner will not be a law abiding citizen if released to parole supervision or that his release is incompatible with the welfare of society. **9 NYCRR §8002.3(c)(5)**. Therefore, it is this Court's opinion that the parole board's decision is unsupported by the objective record before it. The lack of specificity and reasoning in the parole board's written decision, as well as the record before it, failed to overcome the presumption of release in this case. ***Schwartz v. Dennison*, 14 Misc.3d 1220(A), 1227(A) [S. Ct. New York Co. 2006]**.

The reasoning and analysis required by the statute and the rules is simply not in the decision and there is no evidence in the record to shed light on which specific facts the board

might have relied in denying parole release to Petitioner, who has an EEC. ***Oberoi v. Dennison, supra.*** While the Court recognizes the wide latitude and discretion afforded to parole boards, ***Phillips v. Dennison, supra,*** it also recognizes parole board decisions may be vacated when they are arbitrary and capricious and so unsupported by the law as to be irrational and bordering on impropriety. ***Oberoi v. Dennison, supra; Matter of Russo v. New York State Board of Parole, supra.*** In the case at bar, the parole board failed to meet its burden under **9 NYCRR §8002.1(b)** and **9 NYCRR §8002.3(c)**.

This Court finds that the Parole Board failed to follow its obligations under **Executive Law §259-i(2)(c)(A)** and **Corrections Law §805**. The parole board failed to articulate ***any*** basis upon why it denied release. **Executive Law §259-i(2)(c)(A).** It is unacceptable, under the law, for Respondents to have simply restated the statutory language, with no specificity or other explanation to justify parole denial. While this Court recognizes the substantial discretion afforded to parole boards by statutory authority, that authority and parole board decisions are reviewable by courts and must stand up to the other statutory requirements regarding parole release procedures.

In the instant matter, the Court finds that the board has failed to meet those standards by rendering a conclusory decision, and rendered a decision completely unsupported by the record and Petitioner's history of incarceration.

Based on the foregoing, it is therefore

ORDERED, that the Petition is granted to the extent that the Parole Board shall afford the petitioner herein a *de novo* Parole hearing within SIXTY (60) days of the date of entry of this order, and a decision thereon not more than fifteen (15) days thereafter; and it is further

ORDERED, that the *de novo* hearing herein shall consist of at least two Parole Board members, none of whom sat on the prior parole hearing involving the above captioned inmate.

This shall constitute the Decision and Order of this Court.

DATED: January 6, 2017
Monticello, New York

HON. STEPHAN G. SCHICK, JSC

Papers considered:
Notice of Petition, by Kathy Manley, Esq., dated September, 2016
Petition with Exhibits, by Kathy Manley, Esq., dated September, 2016
Answer and Return with Exhibits, by Heather R. Rubenstein, AAG, dated November 8, 2016
Documents for *in camera* review
Reply Affirmation/Memorandum of Law, by Kathy Manley, Esq., dated November 21, 2016